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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 694

WALTER A. GORMAN AND EDWARD ROGERS, JR.,
Appellants,

vs.

THE CITY OF NEW YORK, THOMAS F. MURPHY, JOHN WYNNE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

STATEMENT OF JURISDICTION

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COURT OF APPEALS OF THE STATE OF NEW YORK

WALTER A. GORMAN AND EDWARD ROGERS, JR.,
Plaintiffs-Appellants,

vs.

THE CITY OF NEW YORK AND THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI, AND JOSEPH R. HARLEY, AS MEMBERS OF THE POLICE PENSION FUND CONSTITUTED UNDER ARTICLE 1 OF TITLE B OF CHAPTER 18 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK,

Defendants-Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York in this action.

Opinions Below

The Court of Appeals of the State of New York rendered no opinion herein except as set forth in its memo-

the Fifth and Fourteenth Amendments thereto and to the provisions of Article V, Section 7, of the New York State Constitution. The plaintiffs-appellants are members of the Police Department of the City of New York and as such are members of a pension system under which they were given an automatic right to retire after serving the period of time elected by them as the basis for retirement. They elected twenty years of service and, prior to the enactment of such local law, had an accrued right to retire automatically upon filing an application therefor. Their right so to do, as well as all other benefits conferred under said pension system, had been declared by the aforesaid provision of the Constitution of the State of New York to be contractual and beyond diminution and impairment. The aforesaid local law of which they complain was enacted in 1951 and amended the provisions of law applicable to said pension system so as to render nonautomatic the automatic right of retirement provided for thereunder and to require and make their right of retirement dependent upon continued membership in said Police Department during the period of notice required to be given and the determination of a Board of Trustees.

The State Statute the Validity of Which Is Involved

The State statute here involved is known as Local Law No. 44 of the City of New York of the year 1951. It reads and provides as follows:

> "A Local Law
>
> To amend the administrative code of the city of New York to clarify the provisions relating to payment of pensions to and retirement of police officers.
>
> Be it enacted by the Council as follows:
>
> Section 1. Subdivision (c) of section B18-4.0 of the administrative code of the city of New York is hereby amended to read as follows:

(c) Any member who:

1. Shall have elected to contribute on the basis of retirement after twenty years of service and who has or shall have performed service in the force for at least twenty years, or

2. Shall have elected to contribute on the basis of retirement after twenty-five years of service and who has or shall have performed service in the force for at least twenty-five years, upon his own application in writing to and filed with the board setting forth at what time, not less than thirty days subsequent to the execution and filing thereof, he desires to be retired, shall be retired as of the date specified in said application from such force and service, and placed on the roll of the pension fund, and awarded and granted, to be paid from such fund, an annual pension during his lifetime, not less than one-half of his full salary at the date of his retirement from service, and provided further that at the time so specified for his retirement his term or tenure of office or employment shall not have terminated or have been forfeited, provided further that upon his request in writing the member shall be granted a leave of absence from the date of filing said application until the date the retirement becomes effective.

§2. This local law shall take effect pursuant to sections sixteen and seventeen of the city home rule law."

This local law is not reported officially but is reported unofficially in the New York City Charter and Administrative Code, Cumulative Supplement, Williams Press, Inc. edition, p. 329. It is to be read in conjunction with the body of the pension law applicable to the plaintiffs-appellants, namely, Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York comprising §B18-1.0—B18-10.0 thereof. In particular this local law is to be read in conjunction with the precise section of the pension law

which it purports to amend (B18-4.0 of said Administrative Code) reading as follows:

> "c. Any member who:
>
> 1. Shall have elected to contribute on the basis of retirement after twenty years of service and who has or shall have performed service in the force for at least twenty years, or
>
> 2. Shall have elected to contribute on the basis of retirement after twenty-five years of service and who has or shall have performed service in the force for at least twenty-five years,
>
> upon his own application in writing shall be retired from such force and service, and placed on the roll of the pension fund, and awarded and granted, to be paid from such fund, an annual pension during his lifetime, of not less than one-half his full salary at the date of his retirement from service."

The local law in question must also be read in connection with the provisions of the Constitution of the State of New York contained in Article V, Section 7, thereof, which makes membership in a pension system a contractual relationship, the benefits of which may not be diminished or impaired. This constitutional provision reads and provides as follows:

> "7. [Membership in retirement systems; benefits not to be diminished nor impaired.]
>
> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The Questions Presented

The questions presented by this appeal are set forth with particularity in the assignments of error accompanying the

petition for appeal. In brief they are whether the pension rights of a person which are declared to be contractual by the constitution of the State of New York and which are thus placed within the protection of the contract clause of the Constitution of the United States may thereafter be impaired by the enactment of a law rendering an automatic right of retirement non-automatic and exercisable only after notice of thirty days, or more, of intention to retire when the purpose of the notice requirement is to work a forfeiture of the right to retire.

Manner, Method and Time of Raising Federal Questions Sought to Be Reviewed

The federal questions sought to be reviewed were raised by the plaintiffs-appellants throughout the entire pendency of the above action. They were raised initially by the plaintiffs-appellants in their complaint and they were subsequently raised in the Supreme Court of the State of New York, New York County, on a motion of defendants-respondents to dismiss the complaint and for judgment that the local law in question was valid and constitutional. They were raised thereafter by the plaintiffs-appellants in their briefs before the Supreme Court of the State of New York, Appellate Division, First Department, and finally in their briefs before the Court of Appeals. The questions sought to be reviewed were passed upon by the Supreme Court, New York County, by upholding the positions of the plaintiffs-appellants (ff. 49-84) and were passed upon by the Appellate Division of the Supreme Court by reversing the determination of the Supreme Court and by holding said local law to be constitutional and valid and therefore not repugnant to the federal and state constitutional provisions above described (ff. 121-150). These questions were passed upon by the Court of Appeals by affirming the determina-

tion of the Appellate Division of the Supreme Court. Their involvement before the Court of Appeals is incontestably established by the circumstance that the remittitur of that Court has been amplified so as to include the following statement:

> "Questions under the Federal Constitution were presented and passed upon by this Court; viz., whether Local Law No. 44 of the City of New York of 1951 violates Article I, Section 10, of the Federal Constitution, insofar as it prohibits a state's impairment of contract obligations, and whether the said local law violates the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution. This Court held that the aforesaid local law of the City of New York did not violate Article I, Section 10, of the Federal Constitution or the Fifth or Fourteenth Amendments thereof."

The following portions of the complaint of the plaintiffs-appellants indicate the manner in which the federal questions here involved were raised:

> "That the enactment of said Local Law No. 44 of the year 1951 violates, in addition to Article V of the Constitution of the State of New York, Article I thereof, as well as §10 of Article I of the Constitution of the United States and the Fifth and Fourteenth Amendment thereto and is therefore void and of no effect in law." (f. 41)

The subject matter in question was subsequently raised in the fifth prayer for judgment contained in the complaint which reads as follows:

> "That it be declared that the City of New York is without power to diminish or impair the contractual rights of the plaintiffs as members of the Police Pension Fund created under the aforesaid Article 1 and that the attempted diminution and impairment of

such rights by the enactment of Local Law No. 44 of the year 1951 is unconstitutional and therefore said local law is null and void by virtue of the provisions of Article 5, Section 7, of the New York State Constitution and of Article 1, Section 6 thereof, and of Article 1, Section 10 of the Constitution of the United States and of the Fifth and Fourteenth Amendments thereto." (f. 46)

The involvement of the federal questions raised on this appeal was brought to the attention of the Supreme Court of the State of New York in a memorandum submitted by the plaintiffs appellants in oppositon to the motion made to dismiss their complaint and to have declared as valid and constitutional the local law in question. The initial claim of unconstitutionality was set forth in a preliminary outline of the nature of the relief sought. It was stated, among other things, that the plaintiffs-appellants sought judgment for:

"that Local Law No. 44 of 1951 is unconstitutional and therefore null and void in that it diminishes and impairs the benefits of the plaintiffs as members of such fund in violation of the provisions of Article V, section 7, and of Article 1, Section 6 of the New York Constitution and Article 1, Section 10 of the United States Constitution and of the Fifth and Fourteenth Amendments thereto."

The allegations of paragraph 15, above referred to, were described. In setting forth the issues before the court it was said:

"Finally, there is involved a violation of the provisions of Article 1, Section 10 of our Federal Constitution prohibiting a state, or a municipal subdivision thereof, from passing a law impairing the right of contract and the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution."

The entire material contained in Point I of this memorandum was directed to the proposition that the local law in question impaired the obligation of the contract rights of the plaintiffs-appellants and in the concluding paragraph of this Point, which consisted of nine pages of material, it was said:

> "In conclusion, therefore, we repeat that the right to retire at will upon completion of the elected period of service is a benefit of the contractual relationship which members of the Police Pension Fund created under Article 1 enjoyed on July 1, 1940, and that the City of New York is powerless to diminish or impair that right, by reason of the specific prohibitions of Article 5, Section 7 of our State Constitution, by reason of the due process provisions of Article 1 of Section 6 of the New York Constitution and of the due process provisions contained in the Fifth and Fourteenth Amendments to the Federal Constitution, and finally by reason of the provisions of Article 1, Section 10 of the Federal Constitution prohibiting a State (and any subdivision thereof) from impairing the right of control. As a consequence Local Law 44 of 1951 is null and void and should be so declared by this Court.

Likewise, in the Appellate Division the issue of the repugnancy of Local Law No. 44 of the City of New York of 1951 to the provisions of the federal constitution were forceably brought to the attention of that court by the plaintiffs-appellants in their brief and as well in their oral arguments to the court. In describing the nature of the action they said:

> "More particularly, the plaintiffs seek judgment declaring that as such members, having completed the period of service elected by them under the Pension Law created by the aforesaid statute, they have the right to retire forthwith automatically upon filing an application for retirement, and consequently the enact-

ment of the aforesaid Local Law requiring the giving of thirty days' advance notice of their intention to retire is a diminution and impairment of their right of automatic retirement and therefore invalid as a direct infringement of Article 5, Section 7 of the New York State Constitution, of Article 1, Section 10 of the United States Constitution and of the Fifth and Fourteenth Amendments thereto."

In describing the claims of the plaintiffs-appellants it was said:

> "They also cite the foregoing provisions of the New York State and Federal Constitutions and conclude by alleging the unconstitutionality of Local Law No. 44 by reason thereof * * *"

Again, a considerable portion of the brief of the plaintiffs-appellants was devoted to the subject of the impairment of the obligation of the contractual rights of the plaintiffs-appellants and in their conclusion to Point I of their brief, consisting of some thirteen printed pages, they make the following statement:

> "In conclusion, we repeat that the right to retire at will upon completion of the elected period of service is a benefit of the contractual relationship which members of the Police Pension Fund created under Article 1 enjoyed on July 1, 1940, and that the City of New York is powerless to diminish or impair that right, by reason of the specific prohibitions of Article 5, Section 7 of our State Constitution, by reason of the due process provisions of Article 1 of Section 6 of the New York Constitution and of the due process provisions contained in the Fifth and Fourteenth Amendments to the Federal Constitution, and finally by reason of the provisions of Article 1, Section 10 of the Federal Constitution prohibiting a State (and any subdivision thereof) from impairing the right of contract. As a consequence Local Law 44 of 1951 is null and void and should be so declared by this Court."

In the same vein the matter of the unconstitutionality, from the standpoint of the Federal Constitution, of the local law in quesion, was presented to the Court of Appeals by printed brief and oral argument. In their brief before that court the following statement appears in the preliminary statement:

> "They also seek judgment declaring this law to be unconstitutional under the aforesaid constitutional provisions in that it attempts to make the appellants' right of retirement dependent upon the discretion of the Board of Trustees of the Police Pension Fund constituted under the aforesaid Article 1."

In describing their complaint they make the following statement:

> "They also cite the foregoing provisions of the New York State and Federal Constitutions and conclude by alleging the unconstitutionality of Local Law No. 44 by reason thereof and seek a judgment declaring such unconstitutionality and granting injunctive relief requiring the respondents to accord to them their full rights as members of the Pension Fund involved."

Again, the major portion of Point I of their brief, consisting of some fifteen pages, was devoted to the demonstration of the impairment of the contractual rights of the plaintiffs-appellants by the local law in question and at the end of this material the plaintiffs-appellants make the following statement:

> "In destroying the unconditional right of self-retirement, Local Law 44 amends a most material provision of the pension contract by unilateral action. Apart from the constitutional prohibition against diminution or impairment of the contract benefits, discussed under D, infra, such action is violative of the Federal and State constitutional provisions against impairment of contract and the elementary provisions of contract law.

Trustees of Dartmouth College v. *Woodward*, 17 U. S. 518; *Lynch* v. *U. S.*, 292 U. S. 571; *Deutsche Bank* v. *Cummings*, 83 F. (2d) 554; *Sliosberg* v. *N. Y. Life Insurance Co.*, 217 App. Div. 67; *People* v. *Pierce*, 104 Misc. 343."

At the end of the entire point the plaintiffs-appellants make the following statement:

"For the reasons set forth under this Point I, it is abundantly clear that Local Law 44, the sole purpose of which was to destroy the vested right of self retirement enjoyed by these appellants and all other members of the Article 1 Pension Group, is violative of Article V, Section 7 of the State Constitution and as well Article I, Section 10 of the United States Constitution and the Fifth and Fourteenth Amendments thereof. It is therefore invalid."

Finally, at the end of another major point in their brief before the Court of Appeals they make the following statement:

"Local Law 44 completely disregards the specific command of Article V, Section 7, of our State Constitution that pension benefits shall not be diminished or impaired, and, in addition, it disregards the integrity of contract guaranteed by both our Federal and State Constitutions."

The Questions Are Substantial

The questions presented by this appeal to the Supreme Court of the United States are of outstanding importance not only to the plaintiffs-appellants but to all of the members of the many pension and retirement systems affecting state and municipal employees in the State of New York. The appeal presents the all important question as to whether the constitutional guaranty to the various members of these pension systems that there pension benefits are

contractual in nature and not subject to diminution or impairment is a mere scrap of paper or whether it represents the firm unswerving commitment of the great State of New York, which, being contractual by express constitutional declaration is within the protection of the contract clause of the Constitution of the United States. The question, therefore, is whether the constitutionally ordained contractual pension relationship is such that a person who has devoted a lifetime of effort in the civil service of the State of New York or in a governmental subdivision thereof can rely upon the fact that when his time to retire matures the benefits promised him will be fulfilled and can look to the protection of the contract clause of the Constitution of the United States where his contractual rights have been impaired by a state law.

So that the importance of these questions may be fully appreciated, we present the following statistics taken from Report of New York State Comptroller's Committee on Social Security and Related Pension Problems (1953) Appendix I: The number of persons in the Civil Service of the State of New York and its municipal and other subdivisions who are members of pension systems is 409,142. In addition 69,014 persons are receiving pensions. There are two major state pension systems and three minor state systems, thirty city systems, five town systems and thirteen village systems. Even the figures concerning the City of New York are of monumental proportions. Within the City there are eleven pension systems. The number of municipal employees of the City who are members of pension systems is 192,264 and the number of New York City pensioners is 39,711. What is more, the pension system in which the plaintiffs-appellants are members presents impressive figures since it comprises almost 19,000 active members and almost 10,000 already retired. The question, affecting as it does such a wide number of people, is of undoubted im-

portance not only to the people of the State of New York, but to the entire country as well, particularly when it is remembered that the State of New York is in the forefront of those promoting the rights and well-being of civil servants.

There is another question of preeminent importance on this appeal and that is the fact that municipal and state pension systems are the only recourse which governmental employees have to social security. Under the federal social security laws members of these systems are excluded from the benefits of social security upon the understanding that their membership in governmental pension systems provides not less than the minimum benefits which social security legislation provides. In this light it is clear that the contractual relationship, which the New York State Constitution guarantees to the members of these pension systems, must be upheld as a contractual obligation protected by the Federal Constitution since otherwise the benefits of state and municipal pension systems are rendered illusory and members of such systems do not even have the benefit of social security.

Apart from the overwhelming public importance of the sanctity of pension systems the question presented on this appeal is important from the standpoint of the individual plaintiffs-appellants and all others who are similarly situated with them, in terms of the precise scope of the local law of the City of New York which is involved.

The local law in question takes from them a right which they and their predecessors enjoyed for over fifty years under the pension laws relating to the Police Department of the City of New York—laws which had been in effect in substantially the same form since 1895. It takes away the right to retire automatically after completion of the period of service prescribed by law. Prior to 1895 the right of retirement of a member of the Police Department of the City

of New York, after completion of the prescribed period of service, was a matter addressed to the discretion of those administering the pension law. However, in 1895, a new pension system was enacted which provided that any member of the police force who had served twenty-five years or more "upon his own application in writing", in the absence of charges pending against him, "must" be retired on an annual pension during his lifetime (Chapter 569 of the Laws of 1895). This identical language was re-enacted in 1897 as part of the Consolidation Act of the Greater City (Sec. 355, Chapter 378 of the Laws of 1897) and in a subsequent charter which became effective in 1901 (Chapter 456 of the Laws of 1901). In 1905 the question of the automatic nature of the right of retirement provided for police officers was definitively disposed of by the Court of Appeals of the State of New York. It was unequivocally held to be automatic (*People ex rel. Fitzpatrick* v. *Green*, 181 N. Y. 308, 310).

This automatic right of retirement continued to be effective down to the adoption of the 1951 Local Law now in question.

Prior to July 1, 1940 the pension rights of civil servants in the State of New York were not contractual in nature until after retirement had taken place. Before a member of a pension system retired his rights could be diminished or changed in any way the legislative bodies having jurisdiction of the matter determined. They might even be abolished. It was so held by the Court of Appeals in *Roddy* v. *Valentine*, 268 N. Y. 228 (1935).

The insecure nature of pension rights was a matter of grave concern to many who felt that those entering the public service should have a right to the pension benefits promised to them, particularly in view of the fact that on the whole the salaries paid in public employment were far less than those paid in private employment. It was recog-

nized that the lower salaries obtaining in public employment were in large degree offset by security of position and above all by the promised reward of pension rights. Accordingly, when the question of a new Constitution for the State of New York was raised through the medium of the convocation of a constitutional convention in the year 1937, the matter of making secure provision for pension rights for civil servants was of primary importance. The matter was debated at great length and out of these debates evolved the constitutional provision above mentioned contained in Article V, Section 7 of the New York Constitution. The Constitution itself was approved by the electors of the State of New York in the election in 1937 and became effective January 1, 1938.

Article V, Section 7 of the State Constitution gave the State and its political subdivisions a grace period of two and a half years to revise their pension systems before such systems should become frozen into contracts. New York City, in common with other cities of the State, revised its pension systems including that of its police. By Local Law 2, 1940, it created two separate police pension systems —one for those who were then members of the New York City Police Department, known as Article 1 (§ B18-1.0–B18-10.0 Administrative Code of the City of New York) with which we are alone concerned in this appeal, and the other for those who thereafter would become members of that department (B18-11.0–B18-55.0) with which we are not here concerned.

Section B18-4.0, Subd. c of the Administrative Code enacted by Local Law No. 2, 1940, continued unchanged the automatic retirement provisions of Section 355 of the Old Charter which were carried unchanged into the Administrative Code when it was enacted as a codification and restatement of existing statutes and laws (Laws of 1937,

Chapter 929). It enlarged upon that right by making it available even in the face of pending charges.

In passing upon the effectiveness of that Section B18-4.0, Subd. c of the Administrative Code to enable a member to retire himself on his own application while charges were pending against him, the Court of Appeals sustained the right in *Matter of Pierne* v. *Valentine*, 291 N. Y. 333 (1943). In so doing, the Court of Appeals reaffirmed its holding in *People ex rel. Fitzpatrick* v. *Greene*.

Because of the assertion of the defendants-respondents in this action that the local law in question is a justified exercise of the police power of the City of New York a further question of transcendent importance is raised upon this appeal and that is, whether the pension systems of the State of New York and its many municipalities are a mere illusion in the face of the unequivocal language of the New York Constitution declaring them contractual and prohibiting their impairment and in face of the language of Article 1, Section 10, of the Constitution of the United States prohibiting the several states from passing any law impairing the obligation of contract. The contract thus created, however, does not partake of the usual nature of the many contract situations which are presented to the Supreme Court of the United States. It does not involve the broad general right of contract applicable to contracts in general. Rather it involves a precise and unequivocal declaration of the existence of a special contract arising in the case of pension systems affecting public servants which is described by constitutional mandate to be such, which constitutional mandate declares that the benefits of this special contract may not be diminished or impaired by the State of New York or any of the civil divisions thereof. This special contract is thus removed from the vague general concept of police power and from the alleged intention of the City Council of the City of New York in enacting this local law to fur-

ther an alleged police power. Parenthetically it should be noted that the law is described by the City Council of the City of New York as one to "clarify" the existing law (f. 32).

The police power claims made for the law are all specious. They are that (1) the purpose of the law is "to clarify the provisions relating to payment of pensions to and retirement of police officers", (2) to promote grand jury investigations, and (3) to give the Commissioner of Police an opportunity to prepare for the vacancies caused by retirements.

Obviously the matter of clarifying a law has nothing to do with police power—more than that no legislative body in 1951 can "clarify" a law passed by a legislative body functioning in 1940. Finally, the law was fully clarified in 1905 by *People ex rel. Fitzpatrick* v. *Greene*, 181 N. Y. 308 and in 1943 by *Pierne* v. *Valentine*, 291 N. Y. 333.

Grand jury investigations cannot be promoted because if police officers give testimony of an incriminating character, they will be tried on charges in the thirty day period and will be dismissed and will lose their pensions. They will also run the risk of criminal action with possible fines and imprisonment. If they refuse under waiver of immunity to testify they will under New York State Constitution Article V, Section 6 incur only forfeiture of office and loss of pension rights. In neither case will a person fearing incrimination give testimony. The law therefore does not promote the giving of grand jury testimony.

Nor does the law give the Police Department a chance to prepare for retirements because by its terms every officer on filing his application is entitled to an immediate mandatory leave of absence if he requests one.

Thus the law is not promotive of the health, morals, welfare and well-being of the citizens of the City of New York

nor of any other proper end. It has no reasonable relationship to the public good.

The effect of the law is to work a substantial impairment of the contractual rights of the plaintiffs-appellants and the contractual obligation of the City of New York to make pension payments to the plaintiffs-appellants forthwith upon the filing of the application for retirement contrary to the special and specific constitutional mandate that they are contractual and immune from impairment by the State of New York and its political subdivisions.

What is more, the conceded effect of the law, with reference to the plaintiffs-appellants and all others who have an accrued right to retire, is to deprive them of one-half of a month's salary since the provisions of the new law prescribe either that they work thirty additional days or accept a leave of absence and receive no pay whereas under the pension law, as it existed when it became a contractual relationship, they were entitled to retire forthwith upon a pension at half pay.

In light of the foregoing, and particularly in light of the fact that the pension rights of 409,142 persons now employed by the State of New York and its various civil divisions are threatened, it is submitted that the questions involved in this appeal are most substantial and that the constitutionality of the local law in question should therefore be reviewed by the Supreme Court of the United States.

Respectfully submitted,

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Wood, Molloy, France and
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EXHIBIT "A"

Memorandum of decision of the Court of Appeals of the State of New York, 304 N. Y. 865, decided December 4, 1952.

COURT OF APPEALS OF THE STATE OF NEW YORK

WALTER A. GORMAN and EDWARD ROGERS, JR., *Plaintiffs-Appellants,*

against

THE CITY OF NEW YORK and THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI and JOSEPH R. HARLEY, as members of the Police Pension Fund constituted under Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York, *Defendants-Respondents*

Appeal from a judgment in favor of defendants, entered April 30, 1952, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which (1) reversed an order of the Supreme Court at Special Term (Corcoran, J.), entered in New York County, denying a motion by defendants for a dismissal of the complaint and for judgment declaring Local Law No. 44 of 1951 of the City of New York to be constitutional, (2) granted said motion, and (3) declared said local law to be valid and constitutional. Said local law provided that a member of the police pension fund of the city of New York who had performed service for twenty or twenty-five years and had elected to contribute on the basis of retirement after twenty or twenty-five years of service, "upon his own application in writing to and filed with the board setting forth at what time, not less than thirty days subsequent to the execution and filing thereof, he desires to be retired, shall be retired as of the date specified in said application". This local law

(No. 44) was enacted as an amendment to its predecessor (Local Laws, 1940, No. 2 of City of New York; Administrative Code of City of New York, §B18-4.0) which permitted immediate and automatic retirement and thus permitted police officers whose conduct was under inquiry or suspicion to retire before formal charges could be filed against them, in order to avoid testifying before a grand jury. Section 7 of article V of the State Constitution provided that "membership in any pension or retirement system of a state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." Section 12 of article IX of the State Constitution provided that "Every city may repeal, supersede or modify any law which was enacted upon and which required, pursuant to the constitution, a message from the governor declaring that an emergency existed and the concurrent action of two-thirds of the members of each house of the legislature, insofar as such law relates to the property, affairs or government of such city, except that no city may, unless hereafter authorized by the legislature * * * (b) repeal or supersede any law enacted by the legislature relating to any pension or retirement system or to the making and review of assessments or to the judicial review of dismissals from the civil service." The predecessor of Local Law No. 44 of 1951 (Local Laws, 1940, No. 2 of City of New York) had been re-enacted by the State Legislature by a "curative statute" (L. 1940, ch. 437) which provided that notwithstanding any defect, irregularity or omission of any lawful requirement or lack of statutory authority, the acts and proceedings of the city's legislative body in enacting Local Law No. 2 of 1940 "are hereby legalized and validated". The Appellate Division stated that section 12 of article IX of the State Constitution did not prohibit the adoption of this local law and that the provisions of such law did not violate section 7 of article V of the State Constitution. Plaintiffs argued that Local Law No. 44 of 1951 was unconstitutional in that its predecessor had been enacted by the State Legislature and the city was without power to modify or supersede it (N. Y. Const., art. IX, §12) and in that the amendment deprived members of the police pension fund of an

immediate and automatic retirement and contravened section 7 of article V of the State Constitution. Defendants argued that, even if the 1940 validating act of the Legislature (L. 1940, ch. 437) had converted Local Law No. 2 of 1940 into an act of the Legislature, the 1940 validating act was not an act of the Legislature which required and had been enacted upon an emergency message from the Governor and therefore was not among the acts of the Legislature which could not be superseded by local law (N. Y. Const., art. IX, §12; City Home Rule Law, §21).

Judgment affirmed, with costs; no opinion.

Concur: Loughran, Ch. J., Lewis, Conway, Desmond, Dye, Fuld and Froessel, JJ.

EXHIBIT "B"

Opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, 280 App. Div. 39, 110 N. Y. S. 711, dated March 11, 1952.

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

WALTER A. GORMAN and EDWARD ROGERS, JR.,
Plaintiffs-Respondents,

against

THE CITY OF NEW YORK and THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI and JOSEPH R. HARLEY, as members of the Police Pension Fund Constituted under Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York, *Defendants-Appellants*

Appeal from an order of the Supreme Court at Special Term (Corcoran, J.), entered October 5, 1951, as resettled by an order, entered November 7, 1951, in New York County, which denied a motion by defendants for a dismissal of the

complaint and for judgment declaring New York City Local Law No. 44 of 1951 to be constitutional.

Bergan, J. Plaintiffs are policemen and members of the police pension system of the City of New York. The action is maintained against the city and the members of its police pension fund for a judgment declaring Local Law No. 44 of 1951 invalid on constitutional grounds.

The local law in effect requires a notice of thirty days be given by a policeman who has served the required number of years before his election to retire on pension becomes effective. The retirement of such a policeman had formerly been effective immediately upon his election.

The constitutional validity of the statute is attacked by plaintiffs on the ground that the city was without power to enact such a local law; and, even if it had the power of enactment the law would nevertheless be invalid because it is in conflict with another constitutional provision that membership in a pension system is a contractual relationship, the benefits of which cannot be impaired. (N. Y. Const., art. IX, § 12; art. V, § 7) The court at Special Term was of the opinion that the views of the plaintiffs on these questions were correct and denied defendants' motion for judgment.

We address ourselves first to the power of the city to enact the local law of 1951. The statute governing the manner of retirement of policemen as it read at the time of this enactment provided in terms that a policeman who had served either of the alternative periods of time specified "shall be retired" upon his "own application in writing".

The statute had been enacted in this form by the City of New York as Local Law No. 2 of 1940. It became a law February 13, 1940, and it undertook to amend the Administrative Code in relation to the police pension fund "generally." The statute provided for many changes and dealt in one way or another with fifty-seven pertinent sections of the Administrative Code.

In the same year the Legislature also undertook to deal additionally with the local law that had thus been enacted by the city. By section 2 of chapter 437 of the Laws of 1940, effective April 1st, the Legislature enacted that "Not-

withstanding any defect, irregularity or omission" the "acts and proceedings" of the city's legislative body in enacting Local Law No. 2 "are hereby legalized and validated."

It is argued by the plaintiffs that this enactment to which the generic term "curative statute" has sometimes been given judicially (*Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419, 425) is such a "law enacted by the legislature" relating to a pension or retirement system that the city was without power to alter its own underlying local statute (N. Y. Const., art. IX, §12). The Constitution there excepts from the general legislative power of a city to amend State Laws those relating to a pension system enacted on emergency message from the Governor.

Curative or validating statutes had genesis in a purpose to overcome doubts about certain kinds of local public, and even private, proceedings and determinations. A good example is the resolution of the Suffolk supervisors in 1934 relating to tax warrants said to have lacked legal authorization, which was validated during the pendency of an attack through judicial proceedings, by a "curative statute" (*Bradford* v. *County of Suffolk*, 283 N. Y. 503)

The practice has been extended to the validation of local laws "even if the local law in itself was not a legitimate exercise of city power" (*Matter of Tartaglia* v. *McLaughlin*, *supra*, p. 424). There the curative statute itself was examined as to its own constitutional validity and the court was of opinion that it was "undoubtedly valid" (p. 425).

No court has said that a legislative approval or validation of a local law lifts the local law thereafter into a plane beyond the reach of local legislative power. It is reasonable to suppose, both from the character of the soil which has nourished the growth of New York's "curative statutes" and from the language which the Legislature used in the enactment of this particular one, that no intention existed either to supersede what the city's legislative body had done or for the State to occupy the field of local regulation of a local matter. The intent was to add tensile strength to an existing statutory structure to satisfy minds that might be apprehensive of some theoretical weakness.

The interpretation of this statute is to be arrived at in the customary way by looking at its language. The curative statute of 1940 so far as it is addressed to this local law does not deal with pensions explicitly. It deals with the "acts and proceedings" of the city in pursuing its legislative power. It provides that if there be "any" legal infirmity in the city's enactment of its local law the defect is made good.

If the enactment of the local law was on sound ground, it is manifest from what the Legislature said that the act of validation was not intended to weaken the ground. It certainly was not designed to affect adversely a valid local law. The Legislature was dealing with the contingency that the local law might in some indefinite sense be held by a court to be invalid and the legislative power of the State was being added to that of the city against such a contingency.

It would grossly distort the intent of the Legislature, as expressed in the language used, to suppose that its statute not only operated adversely against the force of a valid local law, but that it so operated as to diminish the power of the local legislative body thereafter to amend its own statute.

The local law of 1951 neither referred to nor affected in any way what the Legislature had done by its "curative statute." It amended the 1940 Local Law by what the title says is "A local law to amend the administrative code of the city of New York."

We conclude, therefore, that the curative statute of 1940 was what its term implies, a statute to be called into effect as a prop against infirmity and that it did not place beyond the power of the city the right to amend the local law to which it referred within the constitutional prohibition against local legislative action superseding a State law relating to a pension.

Even if the State law could be regarded as itself a pension act of the Legislature and not merely a "curative statute," it was not an emergency law within the definition of section 12 of article IX of the Constitution, to which the exception upon local legislative power stated in that section applies.

When all the language of this constitutional section is read together, the exception which contains the limitation is so placed in context in relation to the grant of local power to deal with emergency State laws that the limitation, too, must be deemed related to this kind of State law, i.e., one enacted on emergency message, and chapter 437 of the Laws of 1940 is not one of these.

The Constitutional Convention of 1938 seems to have had this view of what it was doing, and appellants have fully demonstrated that the cities of the State have quite generally felt themselves competent by local laws to deal with pension statutes of the Legislature in the exercise of what they deemed their constitutional powers since 1938. The cumulative effect of these practical constructions of constitutional power has a very considerable force. We hold the city was vested with legislative power to amend in 1951 its own pension statute of 1940.

We turn, then, to another side of the constitutional argument. Even if we sustain the legislative power of the city to enact the statute, plaintiffs contend that it is invalid because it penetrates the wall of protection thrown around membership in a pension sysem by section 7 of article V of the Constitution.

The essential language of this constitutional provision is that "membership in" a pension system is a "contractual relationship" and that the "benefits" of the relationship shall not be "diminished or impaired."

The statute here under attack does not change the length of police service required for eligibility for pension benefits. A thirty-day notice to the city that the member desires to be pensioned at a time when he will be eligible is the direction of the amended statute.

The member is free to serve the notice thirty days before he becomes eligible and his pension begins on the very day of his eligibility. If the beginning point of eligibility goes by without notice of election to take his pension, this has been because the member himself has let it go by.

No compulsion of the statute brings about this. The time at which a member becomes eligible to be pensioned is not postponed by the law of 1951 unless the police member him-

self extends it by failing to give notice that he will take his pension at the earliest time of eligibility.

With the date of the inception of pension not postponed except where the police member postpones it, it makes a fairly tenuous argument to say that the "benefits" of "membership" have been "diminished or impaired" by the requirement of this local law for a thirty-day notice.

And, of course, if the police member had it in his control in the first place to take his pension as soon as eligible the continuance of the requirement for a thirty-day notice is not a diminution or impairment of the benefits of membership in the sense these protective words were used in the Constitution.

The further provision in the local law of 1951 that at the time the police member's application for pension becomes effective his place in the police force shall not have "terminated or have been forfeited" is not on any possible theory open to the construction that it is an impairment or diminution of a pension right, for, of course, the Constitution contemplates a public employment which validly continues until the right to be pensioned matures and it does not imply a restriction upon public authority to remove a member from a public position for valid cause, even though the right to a pension terminates with the removal.

The contractual nature of membership in a pension system does not also freeze public employment into unchangeable status. That a member's benefits in a pension system may not constitutionally be impaired does not also give him a constitutional right to stay in public employment. To do this would place the regulation of public employment beyond the control of any authority, and the New York Constitution cannot be read in this sense.

Public regulation may interpose itself to alter the method of conditions of the enforcement of contractual rights without necessarily impairing, in the constitutional sense, the obligation of the contract. (*Conley v. Barton*, 260 U. S. 677.) There a statute imposed a certain procedural burden on a mortgagee if he was to sustain a foreclosure which had not existed when the mortgage was taken. The court was

of opinion this new burden did not impair the obligation of the contract.

There is, too, a fairly well-marked line of separation between the power of government to regulate public employment unfettered by contractual title in the office, and the contractual rights which when matured, as an earned salary, are an incident to public employment. The principle has often been stated, but never more incisively than it was a century ago by Chief Judge Ruggles in *Conner* v. *Mayor of City of New York* (5 N. Y. 285 [1851]).

The county clerk had been entitled by law to the fees of the office. After the election of Conner as clerk of New York County he had collected the fees, but during his term the Legislature directed that all fees should thereafter belong to the city and the clerk be paid a salary. Notwithstanding the reasonable expectation of the clerk when elected that he would receive the fees for the rest of his term, the impairment of this prospect was not regarded by the court as taking away property in the constitutional sense. "Public offices in this state," remarked the Chief Judge, "are not incorporeal hereditaments" (p. 296).

This separability of contract rights and rights in respect of the regulation of government is apparent too in *People ex rel. Squires* v. *Hand* (158 App. Div. 510) which held that the colonial charters in Southampton could not be affected in respect of property rights granted, but even as an incident to the control of the property could not freeze the legislative power of the State to prevent the revision and rearrangement of the local government of the town.

In the same spirit the ultimate right to a pension does not adversely affect the right of the State to abolish a public office upon the continuance of which a pension depends (*People ex rel. Devery* v. *Coler*, 173 N. Y. 193); or to change a salary which affects the amount of a pension (*Hoar* v. *City of Yonkers*, 295 N. Y. 274). The last case was decided with the constitutional protection of 1938 in mind.

The local law of 1951 requiring the giving of reasonable notice before retirement becomes effective is in its main operative effect a reasonable regulation by the city of the conditions of public employment. It would seem especially

important in the case of policemen to allow the city the benefit of a short time between the decision of the member to retire on pension and the termination of his service.

It is not difficult to envisage resignations on pensions in numbers and at times which could create acute public danger. The nature of the work a policeman does, its close relation to public safety, the emergent and unpredictable nature of the task of preserving the order of the community, all point to the need for timely notice of retirement from service and opportunity to adjust to retirements as they come. It would take very implicit and forbidding constitutional language to deprive local government of the pertinent legislative power to deal freely with the conditions of this kind of employment.

The plaintiffs in their complaint have added to their basic constitutional attack upon the validity of the local law an attack upon the motivation of the city in its enactment. If the legislative power is found to exist and to have been exercised without affecting adversely constitutional rights, that finding usually is regarded as the terminal point of judicial inquiry.

The complaint alleges that the purpose of the city to impair the contractual rights of the plaintiffs is manifest from the statements of district attorneys and others leading to the enactment of the local law of 1951 that the right to immediate retirement on pension frustrated the inquiries of grand juries. The honest policeman will not object to a reasonable delay in allowing his pension under the limited circumstances we have discussed if his official acts as a policeman are the subject of a grand jury inquiry; as to the dishonest policeman, when he has had his constitutional rights protected he has had enough. We are of opinion that the statute is valid. The declaration in the judgment should have been for the defendants since no triable issue of fact is suggested. (*German Masonic Temple Assn. v. City of New York*, 279 N. Y. 452). Our determination is of course limited to the state of facts presented in the complaint before us.

The order of the Special Term should be reversed, with $20 costs and disbursements to appellants, and the motion

of the defendants for a declaratory judgment on the conceded facts of the complaint granted, with costs.

Peck, P. J., Dore, Cohn and Shientag, JJ., concur.

EXHIBIT "C"

Opinion of the Supreme Court of the State of New York, New York County, 109 N. Y. S. 2d 539, Vol. 126, No. 69, N. Y. L. J. 771 dated October 8, 1951.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

WALTER A. GOEMAN and EDWARD ROGERS, JR., *Plaintiffs*,

against

THE CITY OF NEW YORK and THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGO, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI and JOSEPH R. HARLEY, as members of the Police Pension Fund constituted under Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York, *Defendants*

In this action for a declaratory judgment, the plaintiffs ask for a determination of their pension rights as members of the Police Department of the City of New York. They seek a judgment declaring that New York City Local Law No. 44 of 1951, relating to their pensions, is invalid under the Constitution of the State of New York. The defendants are the City of New York and the Board of Trustees of the Police Pension Fund. They move to dismiss the complaint as insufficient in law. The defendants also ask for a direction of judgment in their favor on the authority of *German Masons Temple Association* v. *City of New York* (279 N. Y. 452), claiming that there is no issue of fact in the case and that the defendants are entitled to a declaratory judgment in their favor on the allegations in the complaint.

Article V, section 7, of the New York State Constitution, adopted in 1938, reads: "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

Unlike most of the provisions of the proposed constitution which were made effective January 1, 1939 (Art. XX, sec. 1), the effectiveness of this section was delayed until July 1, 1940. This was not the result of a blunder or an oversight on the part of the draftsmen. It was done deliberately so that pension and retirement systems as they then existed would not be frozen into irrevocable contracts, without giving to the state and local governments which administered such systems time in which to organize them on a basis which they were willing to have contractual (N. Y. Constitutional Convention of 1938, Revised Record, Vol. II, pp. 2545, 2546; Vol. IV, p. 2983). The City of New York chose as the system to which it would be bound by contractual obligation, after July 1, 1940, the one which is set forth in the Administration Code, chapter 18, Title B, "Police Pension Fund," article 1, Sections B18-1.0 to B18-10.0, and article 2, Sections B18-11.0 to B18-55.0. Although this was originally adopted by local law in 1940 (Local Law No. 2 of 1940), it was thereafter enacted into state law (Laws of 1940, chap. 437). It became effective March 29, 1940.

Article 1 (Secs. B18-1.0 to B18-10.0) relates to members of the police department who became members prior to March 29, 1940. The plaintiffs are in that class, and we are concerned in this action only with article 1 and the amendments thereto which are made by Local Law No. 44 of 1951.

Local Law No. 44 makes two major changes in subdivision c of Section B18-4.0 of article 1. Under that subdivision, as enacted by Local Law No. 2 of 1940, a member who has performed service for the required number of years has the right to automatic retirement upon his own application. It provides, in pertinent part, that a member "upon his own application in writing shall be retired from such force and service, and placed on the roll of

the pension fund, and awarded and granted, to be paid from such fund, an annual pension during his lifetime." If there was any doubt as to the meaning of subdivision c, it was resolved by the Court of Appeals in *Matter of Pierno* v. *Valentine* (291 N. Y. 333), which held that the right was given to every member to immediate retirement upon his own application. Under the amendments made by Local Law No. 44 of 1951, however, a retiring member would be required to give thirty days' notice of his impending retirement. He would also be obliged to file his application with the board of trustees of the Police Pension Fund, which could deny him his pension if his term of office were forfeited prior to the retirement date.

By way of preamble, the title of Local Law No. 44 of 1951 states that its purpose is "to clarify the provisions relating to payment of pensions to and retirement of police officers." Even a cursory examination of the amendments contained in this local law reveals that the intention was not to "clarify" the existing police pension law, but to change it. The defendants concede that it was intended to prevent the automatic retirement of members having the necessary service requirements. However salutary that purpose may be, this local law is invalid if it violates the provisions of our State Constitution.

The description in the title of Local Law No. 44 does not neutralize its infringement upon the plaintiffs' constitutional rights. In my opinion it diminishes and impairs the benefits of the contractual relationship between the plaintiffs and the Police Pension Fund under Article V, Section 7, of the Constitution. It is therefore, unconstitutional and void.

The defendants claim that the plaintiffs' benefits remain unchanged; that they are not diminished or impaired in any way. I do not agree. Prior to the enactment of Local Law No. 44 of 1951, the plaintiffs had a right to immediate retirement any time they decided to retire. That right was unqualified. It was unconditional. It was self-executing. No action by any other body was necessary. It was effective even if serious charges were pending against the member (*Matter of Pierno* v. *Valentine, supra;*

and cf. *Matter of Rogalin* v. *N. Y. City Teachers' Retirement Board*, 290 N. Y. 664). Local Law No. 44 deprives the plaintiffs of this right to immediate retirement. It makes a member's right to retirement conditional, and it renders it dependent upon action by the board of trustees. The right ceases to be self-executing.

To require a member to file a thirty-day notice after he makes his decision to retire is to deny him benefits for a period of thirty days. This would diminish the total amount of benefits the member would receive during his retirement by the amount payable to him for thirty days, and it would impair the pension benefits during that thirty-day period. To say that a member would not lose thirty days because he could always retire on any day selected by him provided that he gave thirty days' prior notice is an argument which a member who has an automatic right of retirement would not understand. The Constitution protects his pension rights against such sophistry.

A thirty-day loss of benefits may not seem to be very much. That is not for me to decide. The language of the constitutional provision is clear. It protects a member against any loss, no matter how small. It also protects him from legislation which deprives him of his contractual rights to automatic, self-executing retirement. Local law No. 44 deprives him of this right by requiring that an application for retirement must be filed with the board of trustees. Implicit in this provision is a requirement for action by the board to effectuate the retirement. The *Pierne* case (*supra*) pointed out quite clearly the difference in effect between provisions for automatic retirement and those which require board action where, "however preemptory the command may be, we have consistently held that the retirement is not accomplished until the board has acted" (*Matter of Pierne* v. *Valentine*, *supra*, at p. 343). There is bound to be some delay between the filing of numerous retirement applications and action by a board which meets periodically. Certainly the board of trustees is not constantly in session. However slight the delay may be, it will constitute in every case, as against retirement

eo instante upon application, a diminution of over-all pension benefits and an impairment for the period during which the member awaits board action. We do not overlook the possibility moreover, that the board may arbitrarily refuse to retire a member who is entitled to be retired. It is true that the courts can correct such injustices but the member can be forced to resort to court action and thus be deprived of his pension pending ultimate disposition of his case. The provision for application to the board of trustees for retirement is the addition of a condition precedent which did not exist when Article V, section 7, of the constitution became effective. It is an essential change in the contractual relationship affecting not only the quantum of payments, but also the conditions under which retirement occurs.

The defendants contend that the Constitutional Convention of 1938, in adopting Article V, section 7, of the constitution, intended merely to prevent a reduction in the amounts which would be payable to members of pension systems upon their retirements. I do not agree. In 1935, the Court of Appeals had stated in *Roddy* v. *Valentine* (268 N. Y. 228) that membership in a pension system was not a contractual relationship. That dictum was not limited to the question of monetary benefits. The sponsors of the constitutional provision and the members of the convention certainly had in mind this case as well as *Dodge* v. *Board of Education of Chicago* (302 U. S. 74; cf. Sponsor's memorandum [New York Constitutional Convention of 1938, Revised Record, Vol. II, pp. 1405, 1406]). The proposal for the adoption of Article V, section 7, was thoroughly and extensively discussed and debated in the convention. At one time it was defeated. Later, it was reconsidered and passed (New York Constitutional Convention of 1938, Revised Record, Vol. II, pp. 1404-1425, Vol. III, pp. 2545-2562, Vol. IV, pp. 2982-2993). The measure was strenuously opposed by some delegates and the debates became so heated that one opponent referred to the proposal as a "ghastly thing" and a "rotten deal" (cf. Vol. III, p. 2555). The record of the convention clearly establishes that this new provision in the constitu-

tion did not slip by without the careful scrutiny and consideration of the delegates. I cannot believe that the members of the Constitutional Convention of 1938, some of whom were distinguished jurists and lawyers, and most of whom were learned and experienced in government, did not fully appreciate the implications of the language used in this constitutional amendment. If they had intended to limit its application to a prohibition against reducing the amounts to be paid in pension or retirement systems, they could have written such limitations into Article V, section 7, rather than have drawn a sweeping injunction against not only the diminution but also the impairment of any of the benefits of this contractual relationship.

Even if the members of the convention had intended to limit the proposal as the defendants contend, that would not be determinative. As was said by Chief Judge Lehman in *Kuhn* v. *Curran* (294 N. Y. 207, at 217), "We may not, however, construe the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers, or even a statute enacted by the Legislature. It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the Convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter." It is my opinion that when the people of the state voted to approve the new Constitution in 1938, they knew from the language of Article V, section 7 that thereafter a member of a government pension system had a contract; and that, no matter how small the diminution or impairment might be, such benefits could be neither diminished nor impaired.

The defendants also argue that even if Local Law No. 44 impairs or diminishes the plaintiffs' retirement benefits, it should be sustained as a reasonable exercise of the police power of the City of New York. This contention could be answered simply by pointing out that since this is a motion to dismiss the complaint, the facts alleged in the complaint must be deemed to be true, and they are the only facts before the court. The defendants have not interposed any answer,

and there is nothing before the court, by way of proof or allegation, showing the existence of any emergency.

It is my opinion, however, that the question is of such public importance that it should be answered despite the procedural defects in presenting it. It will be assumed, therefore, that the defendants will be able to show that a number of police officers who were members of the police pension fund and who had the required number of years in service for retirement have retired on pensions in the past year in order to avoid being called before a grand jury and there being asked to sign a waiver of immunity. It will also be assumed that Local Law No. 44 of 1951 will cure this evil by requiring thirty days' notice of retirement. An officer called before a grand jury would no longer be able to retire before his appearance there, because the grand jury could call him during the thirty-day period. If he refused to sign a waiver of immunity, the officer would forfeit his position under Article I, section 6 of the State Constitution, and thus lose his right to a pension (*Matter of Eberle* v. *La Guardia*, 285 N. Y. 247).

Assuming the facts to be as stated, they still would not justify the attempt of the City of New York to avoid its contract obligations. Article V, section 7 of the Constitution is no archaic provision adopted many generations ago. It was approved by the people only thirteen years ago. Conditions have not changed so drastically in that short time that they could not have been anticipated when that constitutional provision was adopted. Wrongdoing by some members of the police department does not constitute a condition which could not have been foreseen by the framers of this constitutional provision and by the people of the state when they approved it. No emergency has suddenly occurred which calls for the exercise of governmental powers outside express constitutional limitations. It is not necessary to record the distressing history of investigations of police corruption in the past half century. The reflection of this history is found in the legislation governing retirement of police officers. Prior to 1895, the granting of police pensions was discretionary with the head of the police department. He had broad powers to prevent retirements.

In 1895, this discretionary power was taken from the department head, but an officer could not retire if charges were pending against him (Laws of 1895, chap. 569). The charges did not even have to be of a formal character. Any charge of a substantial nature made by an identified accuser and taken under consideration by the department prevented the accused officer from retiring (*People* v. *Roosevelt*, 34 N. Y. S. 228). This provision remained in the law until 1940 at which time it was stricken by the police pension legislation sponsored by the City of New York. Up to that time, however, it appears that the People and their representatives were conscious of the possibility that some men in a group as large as the police force might be disloyal to their trust.

It should be noted, moreover, that Article V, section 7, is no general clause such as the contract clause of the federal constitution. It does not leave to the courts the expression of the limitations arising out of the use of the words "contractual relationship." It expressly and specifically prohibits the diminution or impairment of the benefits of that contractual relationship. In my opinion it brings the case within the limitation upon the exercise of police power expressed by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426; "When the provisions of the Constitution in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the State to 'coin money' or to 'make anything but gold and silver coin a tender of payment of debts.' But where constitutional grants and limitations of power are set forth in general clauses which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause." It appears to me that the restrictions in Article V, section 7, are so particularized that it is difficult to imagine what stronger language could have been used to prohibit such legislation as Local Law No. 44 of 1951.

If I were to hold Local Law No. 44 constitutional, I would be amending the absolute restriction by adding an exception. That is a prerogative reserved to the People of the State.

The corporation counsel devotes a portion of his brief to a demonstration that Local Law No. 2 of 1940 is governmentally unsound, and that it would be greatly improved by the amendments contained in Local Law No. 40 of 1951. Whether I agree with this is not important. It is not part of the judicial function to investigate the motives of the administration of the City of New York in 1940 in striking from the law a seemingly sound provision which for more than half a century had prevented police officers from retiring while charges were pending against them. Perhaps Local Law No. 2 of 1940 and the state legislation which validated it could not have been adopted. They did become law, however, and the only way the benefits granted by them to the members of the Police Pension Fund can be diminished or impaired is by constitutional amendment.

Local Law No. 44 also violates article IX, section 12, of the State Constitution, and section 21 of the City Home Rule Law.

Article IX, section 12, of the Constitution, reads in part, as follows: "* * * no city may, unless hereafter authorized by the legislature * * * (b) repeal or supersede any law enacted by the legislature relating to any pension or retirement system * * *." Though the law which Local Law No. 44 of 1951 would amend was itself a local law originally (Local Law No. 2 of 1940), it was "legalized and validated" by state law (Laws of 1940, chapter 437). Subdivision e of section B18-4.0 is, therefore, a law "enacted by the legislature relating to any pension or retirement system" within the prohibition of article IX, section 12, of the Constitution and a "state statute relating to any pension or retirement system" within the meaning of subdivision 10 of section 21 of the City Home Rule Law. In *Matter of Tartaglia* v. *McLaughlin* (297 N. Y. 419), where a state law (Laws of 1948, chap. 4) "legalized and validated" a local law in substantially the same language as the state law did in this instance, the court at page 425 referred to the local law as a "now state-adopted local law." In the

Pierne case (*supra*), the Court of Appeals, at pages 343, 344, discussed section B18-4.0, not in terms of what the City Council did or intended, but constantly in terms of what the Legislature did and intended. It had become state legislation, and from the moment that it did the local legislative bodies were without power to modify it as they attempted to do in Local Law No. 44.

The complaint states a valid cause of action, and the motion to dismiss is denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 694

WALTER A. GORMAN AND EDWARD ROGERS, JR.,
Appellants,

v.

THE CITY OF NEW YORK, THOMAS F. MURPHY, JOHN WYNNE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

DENIS M. HURLEY,
Corporation Counsel,
W. BERNARD RICHLAND,
Assistant Corporation Counsel,
Counsel for Appellees.

PAULINE K. BERGER,
Of Counsel.

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COURT OF APPEALS OF THE STATE OF NEW YORK

WALTER A. GORMAN AND EDWARD ROGERS, JR.,

against *Plaintiffs-Appellants,*

THE CITY OF NEW YORK AND THOMAS F. MURPHY, ETC., AS MEMBERS OF THE POLICE PENSION FUND CONSTITUTED UNDER ARTICLE I OF TITLE B OF CHAPTER 18 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK,

Defendants-Appellees.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellees in the above entitled cause, for their joint statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question which is sought to be presented on this appeal is the validity of a local law of the City of New York (Local Law 44 for the year 1951), which requires New York City policemen who are members of the Police Pension System to give thirty days' advance notice in writing of their intention to retire for service upon a life pension. Under the prior law (Administrative Code § B18-4.0, as added by Local Law 2 for the year 1940), such a member was granted the privilege of retiring without ad-

vance notice, upon the filing of his written application for such retirement.

The appellants contended that the privilege of retiring without notice constituted a contractual right, by reason of the provisions of Article V §7 of the New York State Constitution which provided as follows:

> "After July 1st, 1940, membership in any pension or retirement system of the state or civil division thereof, shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

The New York courts in this case held that the privilege of retiring without advance notice was not one of the "benefits" of "membership in a retirement system," within the meaning of the above quoted Constitution so as to be beyond the power of the Legislature to change.

The Courts in this case have also held that the privilege of retiring without advance notice being one of the terms and conditions of public office, is not contractual in nature and is therefore subject to change or revision by the Legislature, as the public interest requires.

Appellants contend that the local law impairs the obligation of contract in violation of Article I §10 of the Fourteenth Amendment of the Constitution of the United States and deprives them of their property without due process of law, in violation of the Fifth and Fourteenth Amendments of the Constitution.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The New York Courts have held:

(1) that the Constitution cannot be interpreted so as to

> "freeze public employment into unchangeable status * * *. To do this would place the regulation of public

employment beyond the control of any authority and the New York Constitution cannot be read in this sense."

(2) that under Local Law 44 for the year 1951

"the member is free to serve his notice thirty days before he becomes eligible and his pension begins on the very day of eligibility * * *. The time at which a member becomes eligible to be pensioned is not postponed by the Law of 1951 unless the police member himself extends it by failing to give notice that he will take his pension at the earliest time of eligibility."

(Opinion of Appellate Division, R. fols. 137-8; 140-2.)

This construction by the New York Courts of its own State Constitution and its own State statutes is conclusive upon this Court. *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167.

Since there is no "impairment" of a policeman's right to retire, under the effect of the law as interpreted by the Courts of New York, there has been no violation of the Fourteenth Amendment of the Constitution or of Article I §10, regardless of whether the privilege of retiring without advance notice be considered contractual or not. *Conley* v. *Barton*, 260 U. S. 677, 681 (1923).

Moreover, this Court has held time and again that public office and the terms and conditions of its tenure and conduct, do not involve any contractual relationship between the holder thereof and the government and that neither the Fourteenth Amendment nor Article I §10 of the Federal Constitution deprives a state of the power to modify or change the tenure of such office, or the terms and conditions thereof as the public interest requires. *Butler* v. *Penn.*, 10 How. 402, 416-7 (1850); *Higginbotham* v. *Baton Rouge*, 306 U. S. 535 (1939), rehearing denied 307 U. S. 649; *Dodge* v.

Board of Education, 302 U. S. 74, 78-9; *Phelps* v. *Board of Education*, 300 U. S. 319 (1937). This is merely an extension of the basic doctrine, established by this Court early in the history of the Constitution and continued up to the present time, that the term "contract", as used in the Constitution, was never intended to and does not restrain the states in the regulation of their civil institutions adopted for internal government. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 627-9; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424 (1952), rehearing denied 343 U. S. 921; *N.Y. and N.E. RR. Co.* v. *Bristol*, 151 U. S. 556, 567, 571; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672.

The purpose of the local law under attack here is as apt an example of the application of the police power as can be imagined: its purpose is to prevent police officers from frustrating the law enforcement agencies and the grand juries by refusing to give account of their activities and retiring *instante* upon a life pension when their activities in public office are under scrutiny. Thus, even if, as we do not for a moment concede, the relationship affected by the local law was contractual, the State was not inhibited from regulating it in order to preserve the community from injury. *Day-Brite Lighting, Inc.* v. *Missouri, supra; Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1933); *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32 (1939).

Upon the basis of the foregoing principles, this Court has repeatedly dismissed appeals involving similar questions. *Allen* v. *City of Long Beach*, 342 U. S. 804, dismissing appeal from 224 Pac. 2d 792; *Campbell* v. *Aldrich*, 305 U. S. 559, dismissing appeal from 79 Pac. 2d 257, Sup. Ct., Oregon (1938); *State ex rel. Porterie* v. *Walmsley*, 296 U. S. 540, rehearing denied 296 U. S. 663, dismissing appeal from 162 So. 826, Sup. Ct., Louisiana (1935).

We submit that the questions presented by this appeal

have so repeatedly and uniformly been decided adversely to appellants' contentions that no substantial question is presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Courts of the State of New York herein be affirmed.

Dated, New York, March 9, 1953.

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Assistant Corporation Counsel.

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PAULINE K. BERGER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 694

WALTER A. GORMAN AND EDWARD ROGERS, JR.,
Appellants,

vs.

THE CITY OF NEW YORK AND THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI AND JOSEPH R. HARLEY, AS MEMBERS OF THE POLICE PENSION FUND CONSTITUTED UNDER ARTICLE 1 OF TITLE B OF CHAPTER 18 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 694

WALTER A. GORMAN AND EDWARD ROGERS, JR.,
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THE CITY OF NEW YORK AND THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI AND JOSEPH R. HARLEY, AS MEMBERS OF THE POLICE PENSION FUND CONSTITUTED UNDER ARTICLE 1 OF TITLE B OF CHAPTER 18 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANT-RESPONDENTS' STATEMENT IN OPPOSITION AND MOTION TO DISMISS OR AFFIRM.

The defendants-respondents argue against the jurisdiction of this Court on four separate grounds, none of which, we submit, is a valid ground and all of which, we further submit, are unresponsive and otherwise illfounded.

I

The Defendants-Respondents Are in Error in Contending That the Determination of the New York State Court of Appeals Divorces the Supreme Court of the United States of Its Jurisdiction to Interpret and Enforce the Contract Clause of the United States Constitution.

The defendants-respondents, first of all, contend that because the courts of the State of New York have the right to construe their own Constitution, it follows that the matter of determining whether a state law violates Article 1, Sec. 10 of the United States Constitution is thereby removed from the purview of this Court, such that the state court holding is conclusive upon it. This claim is obviously unfounded since if it had any merit, it would mean that the interpretation of an important provision of the Federal Constitution is taken away from the Supreme Court of the United States and turned over to the several state courts for their exclusive interpretation and enforcement of it. There are a host of cases which this Court has decided in which it has eloquently denied any such power in the state courts and in which it has invariably announced that while the decisions of state courts will be given great weight, nevertheless, it is the duty of this Court—a duty which this Court cannot shirk or delegate to others—to make the final disposition of any question of conflict between the Federal Constitution and the validity of a state law.

What is more, Title 28, U. S. Code Sec. 1257 (2), defining the jurisdiction of this Court undermines the position of the defendants-respondents in providing that this Court shall have jurisdiction—

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the

United States, and the decision is in favor of its validity."

The claim which the defendants-respondents now make has been made but rejected in a number of cases, some of which oddly enough, defendants-respondents cite. This Court, as we have just stated, invariably denies their validity. The rule was forcefully enunciated in *McCullough v. Virginia*, 172 U. S. 102, page 109, in the following language:

> "It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this Court to accept the construction placed by the courts of a state upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, in which the Court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State. It

never was intended, and cannot be sustained by any course of reasoning, that this Court should, or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion.' "

To the same effect is *Phelps* v. *Board of Education*, 300 U. S. 319 (1936) which be it noted the defendants-respondents have cited for their position:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of a statute by the courts of the state."

In the same vein, this Court, in *Hale* v. *State Board*, 302 U. S. 95 (1937) made the following declaration at page 101:

> "The power is ours when the impairment of an obligation is urged against a law to determine for ourselves the effect and meaning of the contract as well as its existence."

More recently, and more forcefully, this Court disposed of a similar claim in *Atlantic Coast Line* v. *Phillips*, 332 U. S. 168, when it said at page 170:

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations."

Finally, we quote from *Appleby* v. *City of New York*, 271 U. S. 364 (1925) in which this Court held that a contract right was impaired by the enactment of a law by the New York State legislature despite the fact that the New York State Court of Appeals had held that there was no impair-

ment of contract. Concerning the claim that the determination of the state court was conclusive, this Court, per Taft, C.J., said:

> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we can not perform our duty to enforce the guaranty of the Federal constitution as to the inviolability of contracts by state legislative action unless we give the question independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment."

See also *Detroit United Ruy.* v. *Michigan*, 242 U. S. 238 at 249.

II

The Defendants-Respondents Are in Error When They Claim That the Plaintiffs-Appellants Insist upon a Constitutional Right to Retain Public Office. Contrary-Wise, the Plaintiffs-Appellants Claim a Right to Be Relieved of Public Office Through Retirement.

The second ground urged by the defendants-respondents as to why this Court lacks jurisdiction is based upon the claim that the New York Courts have held that the New York constitution cannot be interpreted so as to "freeze public employment into unchangeable status." In this regard, the defendants-respondents quote with a notable omission a portion of the language of the Appellate Division of the Supreme Court of New York in its opinion reversing the Supreme Court of New York, at Special Term, a copy of which is annexed to the jurisdictional statement as Ex-

hibit "B." However, if the material referred to is quoted without the omission just mentioned, it can readily be seen how inept the quotation is. It reads as follows:

> "The contractual nature of membership in a pension system does not also freeze public employment into unchangeable status. That a member's benefits in a pension system may not constitutionally be impaired does not also give him a constitutional right to stay in public employment." (Exhibit "B," page 28.)

Clearly, the plaintiffs-appellants have not asserted "a constitutional right to stay in public employment." Quite to the contrary, they seek to sustain their right to retire on pension—an act which is the very antithesis of staying in public employment. Of course, the principle that no one has the right to remain in public employment is an ancient one, and the cases which have asserted the absence of such a right are legion. To advert to this principle, however, determines nothing and does not begin to touch upon the subject of the right to retire forthwith at will after the completion of a prescribed number of years of service.

By the same token, the several cases which the defendants-respondents have cited concerning situations where public employees have claimed the right to continue in public employment or the right to continue to enjoy the emoluments thereof as they existed when their employment commenced are quite beside the point (*Butler* v. *Penn*, 10 Howard 402; *Higginbothon* v. *Baton Rouge*, 306 U. S. 535).

Furthermore, the additionally quoted language from the Appellate Division of the New York Supreme Court relied upon by the defendants-respondents for the proposition that the local law in question has not impaired any rights of the plaintiffs-appellants because under it a police officer may give advance notice of his intention to retire thirty days before the completion of the period as of which his eligibility to retire begins, is not only completely immaterial to the

subject of the jurisdiction of this Court but what is more, is on its face, completely immaterial to the facts of this case. The plaintiffs-appellants herein had prior to the enactment of Local Law 44, already served the period of time necessary to be eligible to retire. How in the name of common sense the plaintiffs-appellants could, after the enactment of this local law in 1951 give notice of intention to retire as of a time prior to the enactment of the law defies understanding. This contention can only apply to police officers who had not completed their prescribed period of service before the law went into effect. This citation of alleged authority in and of itself demonstrates the complete insupportability of the position of the defendants-respondents.

III

The Local Law in Question Was Not Enacted in Furtherance of Any Police Power Nor May the Claim of Police Power Be Advanced as Justification for the Impairment of Contractual Rights Constitutionally Recognized and Constitutionally Guaranteed.

The third attack upon the jurisdictional statement proceeds upon the argument that the purpose of the local law in question was to prevent the frustration of grand juries and the impairment of investigations. In the jurisdictional statement, pages 18-20, we have conclusively shown that no such frustration (assuming any exists) is cured by the law in question. We have demonstrated further that the legislatively announced purpose of the law was "to clarify" (p. 19) the existing pension law and that assuming other purposes to be involved, nevertheless, they cannot in the slightest degree be accomplished because as far as grand juries are concerned, no police officer fearing incrimination would waive immunity and testify against himself thereby exposing himself to loss of position and loss of pension *and crim-*

inal penalties, since the effect of refusal to waive is at most loss of position and pension.

The further contention that this law is designed to give the City of New York an opportunity to prepare itself against retirement, is completely erroneous because the law itself by its own terms gives to anyone filing notice of retirement an automatic leave of absence forthwith upon filing the notice.

The conclusion is inevitable that the purpose of the law was to present to the City of New York a means of working forfeiture of pension rights in the case of officers who might refuse to sign waivers of immunity when called before grand juries. No other purpose is discernible and every argument that has been used to disguise the effect of the law and to attribute to it, any other purpose is insincere and unjustified.

The law itself is a clear violation of a clearly defined, specific, precise contractual right so declared by constitutional language free from doubt as to meaning and content, such that even assuming a police power could be discerned, it would follow that the asserted police power would inevitably be subordinate to the constitutional mandate.

IV

The Defendants-Respondents Are in Error in Contending That the Issues on This Appeal Have Been Repeatedly Passed upon by This Court.

Finally, the defendants-respondents are wrong when they assert that the subject matter of this appeal does not raise novel issues and when they additionally claim that the issues raised have been frequently passed upon by this Court.

The nearest this Court has come to a consideration of the issues here involved has been in the case of *Hall* v. *Wisconsin*, 103 U. S. 5, (1880). This case which on principle is controlling, held that where a legislative enactment of the State of Wisconsin directed the Governor of that

state "to make a written contract" with a geologist, and the Governor did enter, the geologist thereby acquired the status of a person having a contract of employment and not that of a public officer, and accordingly, any statute thereafter enacted which diminished the salary of the geologist, constituted an impairment of his contract in direct violation of the mandate contained in the contract clause of the United States Constitution. We submit that this legislatively declared contract is no different in principle from the constitutionally declared contract of the plaintiffs-appellants and that as a consequence, the decision in the *Hall* case requires that this Court not only assume jurisdiction of the present appeal but what is more, determine the issues presented by its favorably to the plaintiffs-appellants.

It follows therefore, that the defendants-respondents are grossly in error when they claim that the issues presented by this appeal have been passed upon many times and have uniformly been determined against those asserting the protection of the contract clause.

We respectfully submit, therefore, that this Court has jurisdiction of this appeal and that the motion of the defendants-respondents to dismiss the appeal or affirm the judgment should be denied.

Respectfully submitted,

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No. 694

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Court of Appeals
of the State of New York

WALTER A. GORMAN and EDWARD ROGERS, JR.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK and THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI and JOSEPH R. HARLEY, as members of the Police Pension Fund constituted under Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York,

Defendants-Respondents.

PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANTS-RESPONDENTS' STATEMENT IN OPPOSITION AND MOTION TO DISMISS OR AFFIRM

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Court of Appeals
of the State of New York

WALTER A. GORMAN and EDWARD ROGERS, JR.,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK and THOMAS F. MURPHY, JOHN WYNNE, JOSEPH J. REGAN, JR., JAMES A. SHERIDAN, JOHN E. CARTON, LAZARUS JOSEPH, FRANK SAMPSON, SPENCER C. YOUNG, MARIO BIAGGI, RICHARD J. SULLIVAN, ALFRED A. FUGAZZI and JOSEPH R. HARLEY, as members of the Police Pension Fund constituted under Article 1 of Title B of Chapter 18 of the Administrative Code of the City of New York,

Defendants-Respondents.

PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANTS-RESPONDENTS' STATEMENT IN OPPOSITION AND MOTION TO DISMISS OR AFFIRM

The defendants-respondents argue against the jurisdiction of this Court on four separate grounds, none of which, we submit, is a valid ground and all of which, we further submit, are unresponsive and otherwise ill-founded.

I

The defendants-respondents are in error in contending that the determination of the New York State Court of Appeals divorces the Supreme Court of the United States of its jurisdiction to interpret and enforce the contract clause of the United States Constitution.

The defendants-respondents, first of all, contend that because the courts of the State of New York have the

right to construe their own Constitution, it follows that the matter of determining whether a state law violates Article 1, Sec. 10 of the United States Constitution is thereby removed from the purview of this Court, such that the state court holding is conclusive upon it. This claim is obviously unfounded since if it had any merit, it would mean that the interpretation of an important provision of the Federal Constitution is taken away from the Supreme Court of the United States and turned over to the several state courts for their exclusive interpretation and enforcement of it. There are a host of cases which this Court has decided in which it has eloquently denied any such power in the state courts and in which it has invariably announced that while the decisions of state courts will be given great weight, nevertheless, it is the duty of this Court—a duty which this Court cannot shirk or delegate to others—to make the final disposition of any question of conflict between the Federal Constitution and the validity of a state law.

What is more, Title 28, U. S. Code, Sec. 1257 (2), defining the jurisdiction of this Court undermines the position of the defendants-respondents in providing that this Court shall have jurisdiction:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The claim which the defendants-respondents now make has been made but rejected in a number of cases, some of which oddly enough, defendants-respondents cite. This Court, as we have just stated, invariably denies their validity. The rule was forcefully enunciated in *McCullough v. Virginia*, 172 U. S. 102, at page 109, in the following language:

"It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this Court to accept the construction placed by the courts of a state upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State. It never was intended, and cannot be sustained by any course of reasoning, that this Court should, or could with fidelity to the Constitution of the United States follow the

> construction of the Supreme Court of a State in such a matter, when it entertained a different opinion.' "

To the same effect is *Phelps* v. *Board of Education*, 300 U. S. 319 (1936) which be it noted the defendants-respondents have cited for their position:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of a statute by the courts of the state."

In the same vein, this Court, in *Hale* v. *State Board*, 302 U. S. 95 (1937) made the following declaration at page 101:

> "The power is ours when the impairment of an obligation is urged against a law to determine for ourselves the effect and meaning of the contract as well as its existence."

More recently, and more forcefully, this Court disposed of a similar claim in *Atlantic Coast Line v. Phillips*, 332 U. S. 168, when it said at page 170:

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations."

Finally, we quote from *Appleby* v. *City of New York*, 271 U. S. 364 (1925) in which this Court held that a contract right was impaired by the enactment of a law by the New York State Legislature despite the fact that the New York State Court of Appeals had held that there

was no impairment of contract. Concerning the claim that the determination of the state court was conclusive, this Court, per Taft, C. J. said:

> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we can not perform our duty to enforce the guaranty of the Federal constitution as to the inviolability of contracts by state legislative action unless we give the question independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment."

See also *Detroit United Rwy.* v. *Michigan*, 242 U. S. 238 at 249.

II

The defendants-respondents are in error when they claim that the plaintiffs-appellants insist upon a constitutional right to retain public office. Contrary-wise, the plaintiffs-appellants claim a right to be relieved of public office through retirement.

The second ground urged by the defendants-respondents as to why this Court lacks jurisdiction is based upon the claim that the New York Courts have held that the New York constitution cannot be interpreted so as to "freeze public employment into unchangeable status". In this regard, the defendants-respondents quote with a

notable omission a portion of the language of the Appellate Division of the Supreme Court of New York in its opinion reversing the Supreme Court of New York, at Special Term, a copy of which is annexed to the jurisdictional statement as Exhibit "B". However, if the material referred to is quoted without the omission just mentioned, it can readily be seen how inept the quotation is. It reads as follows:

> "The contractual nature of membership in a pension system does not also freeze public employment into unchangeable status. That a member's benefits in a pension system may not constitutionally be impaired does not also give him a constitutional right to stay in public employment." (Exhibit "B", pages 8-9.)

Clearly, the plaintiffs-appellants have not asserted "a constitutional right to stay in public employment". Quite to the contrary, they seek to sustain their right to retire on pension—an act which is the very antithesis of staying in public employment. Of course, the principle that no one has the right to remain in public employment is an ancient one, and the cases which have asserted the absence of such a right are legion. To advert to this principle, however, determines nothing and does not begin to touch upon the subject of the right to retire forthwith at will after the completion of a prescribed number of years of service.

By the same token, the several cases which the defendants-respondents have cited concerning situations where public employees have claimed the right to continue in public employment or the right to continue to enjoy the emoluments thereof as they existed when their employment commenced are quite beside the point (*Butler* v. *Penn*, 10 Howard 402; *Higginbotham* v. *Baton Rouge*, 306 U. S. 535).

Furthermore, the additionally quoted language from the Appellate Division of the New York Supreme Court relied upon by the defendants-respondents for the proposition that the local law in question has not impaired any rights of the plaintiffs-appellants because under it a police officer may give advance notice of his intention to retire thirty days before the completion of the period as of which his eligibility to retire begins, is not only completely immaterial to the subject of the jurisdiction of this Court but what is more, is on its face, completely immaterial to the facts of this case. The plaintiffs-appellants herein had prior to the enactment of Local Law 44, already served the period of time necessary to be eligible to retire. How in the name of common sense the plaintiffs-appellants could, after the enactment of this local law in 1951 give notice of intention to retire as of a time prior to the enactment of the law defies understanding. This contention can only apply to police officers who had not completed their prescribed period of service before the law went into effect. This citation of alleged authority in and of itself demonstrates the complete insupportability of the position of the defendants-respondents.

III

The local law in question was not enacted in furtherance of any police power nor may the claim of police power be advanced as justification for the impairment of contractual rights constitutionally recognized and constitutionally guaranteed.

The third attack upon the jurisdictional statement proceeds upon the argument that the purpose of the local law in question was to prevent the frustration of grand juries and the impairment of investigations. In the jurisdictional statement, pages 21-23, we have conclusively shown that no

such frustration (assuming any exists) is cured by the law in question. We have demonstrated further that the legislatively announced purpose of the law was "to clarify" (p. 21) the existing pension law and that assuming other purposes to be involved, nevertheless, they cannot in the slightest degree be accomplished because as far as grand juries are concerned, no police officer fearing incrimination would waive immunity and testify against himself thereby exposing himself to loss of position and loss of pension *and criminal penalties*, since the effect of refusal to waive is at most loss of position and pension.

The further contention that this law is designed to give the City of New York an opportunity to prepare itself against retirement, is completely erroneous because the law itself by its own terms gives to anyone filing notice of retirement an automatic leave of absence forthwith upon filing the notice.

The conclusion is inevitable that the purpose of the law was to present to the City of New York a means of working forfeiture of pension rights in the case of officers who might refuse to sign waivers of immunity when called before grand juries. No other purpose is discernible and every argument that has been used to disguise the effect of the law and to attribute to it, any other purpose is insincere and unjustified.

The law itself is a clear violation of a clearly defined, specific, precise contractual right so declared by constitutional language free from doubt as to meaning and content, such that even assuming a police power could be discerned, it would follow that the asserted police power would inevitably be subordinate to the constitutional mandate.

IV

The defendants-respondents are in error in contending that the issues on this appeal have been repeatedly passed upon by this Court.

Finally, the defendants-respondents are wrong when they assert that the subject matter of this appeal does not raise novel issues and when they additionally claim that the issues raised have been frequently passed upon by this Court.

The nearest this Court has come to a consideration of the issues here involved has been in the case of *Hall* v. *Wisconsin*, 103 U. S. 5 (1880). This case which on principle is controlling, held that where a legislative enactment of the State of Wisconsin directed the Governor of that state "to make a written contract" with a geologist, and the Governor did enter, the geologist thereby acquired the status of a person having a contract of employment and not that of a public officer, and accordingly, any statute thereafter enacted which diminished the salary of the geologist, constituted an impairment of his contract in direct violation of the mandate contained in the contract clause of the United States Constitution. We submit that this legislatively declared contract is no different in principle from the constitutionally declared contract of the plaintiffs-appellants and that as a consequence, the decision in the *Hall* case requires that this Court not only assume jurisdiction of the present appeal but what is more, determine the issues presented by it favorably to the plaintiffs-appellants.

It follows therefore, that the defendants-respondents are grossly in error when they claim that the issues presented by this appeal have been passed upon many times and have uniformly been determined against those asserting the protection of the contract clause.

We respectfully submit, therefore, that this Court has jurisdiction of this appeal and that the motion of the defendants-respondents to dismiss the appeal or affirm the judgment should be denied.

Respectfully submitted,

WOOD, MOLLOY, FRANCE & TULLY,
By JAMES H. TULLY,
A Member of the Firm,
Attorneys for Plaintiffs-Appellants.

JAMES H. TULLY,
TRUMAN H. LUHRMAN,
of Counsel.

MAY 25, 1953.

Per Curiam Decisions.

No. 694. GORMAN ET AL. *v.* CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *James H. Tully* and *Truman H. Luhrman* for appellants. *Denis M. Hurley* and *W. Bernard Richland* for appellees. Reported below: 304 N. Y. 865, 109 N. E. 2d 881.